Supreme Court, U.S.
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No. 01-969

In The

Supreme Court of the United States

CHRISTI ALFRED,

Petitioner,

v.

CATERPILLAR INC., a/k/a and/or d/b/a CAT, a/k/a and/or d/b/a CAT, a foreign corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Although Petitioner poses five questions for review, in reality all such questions are answered by a single inquiry: Under Federal Rule of Evidence 702 and this Court's opinions in *Daubert and Kumho Tire*, was the trial court authorized and empowered, after full consideration of the proffered expert's trial testimony, to find that the testimony lacked evidentiary reliability, and to strike portions of that witness' testimony due to the witness' inadequate qualifications and insufficient methodology?

CORPORATE DISCLOSURE STATEMENT

Respondent, Caterpillar Inc., has no parent corporation. No publicly held company owns ten percent or more of its stock.

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STATEMENT OF THE CASE

Petitioner, a United States Navy Seabee on active duty, was injured when the operator of a Caterpillar asphalt paver, a fellow United States Navy Seabee, moved the machine forward instead of backward, and struck her. In this manufacturer's products liability action, Petitioner alleged that the paver, a very specialized and precise piece of construction equipment requiring precise speed control, was defective in design and unreasonably dangerous. In particular, the paver was criticized because it had a variable speed dial control rather than a lever control. Respondent, Caterpillar Inc., denied that the paver was defective or unreasonably dangerous.

At trial, Petitioner presented but two witnesses who addressed the circumstances of the accident and the alleged product defect; i.e., Petitioner and Petitioner's proffered "expert," William P. Munsell. The focus of Mr. Munsell's testimony was his opinion that the speed control dial's design was "counter-intuitive," a topic which fell within a recognized scientific field known as "human factors engineering." Mr. Munsell was not a human factors engineer and otherwise lacked appropriate qualifications and experience in that area. Petitioner failed to present any probative evidence relating to whether the claimed defect rendered the paver unreasonably dangerous under Oklahoma law.

After Petitioner rested, Respondent moved to strike the testimony of Mr. Munsell pursuant to Federal Rule of Evidence 702 and this Court's opinions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct.

2786, 125 L. Ed. 2d 469 (1993) and *Kuhmo Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). Concurrently, Respondent moved for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure for the reason that the evidence, when taken in the light most favorable to the Petitioner, did not establish a *prima facie* basis for the required elements of the asserted cause of action, manufacturer's products liability.

After evaluating Mr. Munsell's qualifications and methodology, and after oral presentations of positions by both Petitioner's counsel and Respondent's counsel, the trial court concluded that the witness was not sufficiently qualified by experience, background or education to render opinions, and that the methodology he utilized was likewise lacking and insufficient. Engaging in a two step process, the trial court made detailed findings concerning the basis for its conclusions, then struck the "expert" testimony. Immediately thereafter, the trial court also granted Respondent's motion for judgment as a matter of law, concluding that there was no proof of a defect and no proof that the paver was unreasonably dangerous, as required by Oklahoma law.

After full consideration of briefs submitted by Petitioner and Respondent, consideration of the record before it, and oral argument, the United States Court of Appeals for the Tenth Circuit concluded that the trial judge had erred in but one respect. It found that Mr. Munsell's opinion of the speed control mechanism's noncompliance with a voluntary industry standard (SAE J297) was sufficiently reliable and relevant to be admissible. Accordingly, the Tenth Circuit reversed the decision striking that

portion of his testimony. The remaining rulings of the trial judge were affirmed, including her ruling that Mr. Munsell's qualifications and methodology in the area of "human factors" were insufficient.

The Tenth Circuit reviewed *de novo* the granting of judgment as a matter of law in favor of the Petitioner, and independently concluded that although the Respondent's suggested failure of the speed control dial to comply with a published standard could have allowed the jury to infer a defect in the paver, there was no evidence that any such defect made the paver unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer, as defined by Oklahoma law. Thus, the Tenth Circuit independently concurred with the trial judge in finding the evidence inadequate to support a jury verdict in favor of the Petitioner under Oklahoma law. Judgment as a matter of law in favor of the Respondent was affirmed..

SUMMARY OF RESPONDENT'S POSITION

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, a petition for a writ of certiorari will be granted only for compelling reasons. A compelling reason is not present here. Respondent asserts that this Court is not faced with a case in which a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, and has not departed from the accepted and usual course of judicial proceedings or sanctioned a departure by a lower court. Further, a United States court of appeals has not decided

an important question of federal law that has not been settled by this Court or decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioner's suggestions that both her Fifth and Seventh Amendment rights have been violated is without factual or legal merit. Petitioner's claim of lack of notice is baseless, as the Federal Rules of Evidence and decisions of this Court have long made it clear that expert witnesses must be qualified and use appropriate methodology so that their opinions are reliable and of assistance to the jury. Since 1993, all parties to lawsuits have likewise been on notice of the trial judge's specific gatekeeper function and responsibility. Likewise, plaintiffs in manufacturer's products liability cases tried under Oklahoma law have since 1974 been on notice of the elements of the cause of action they must prove in order to prevail. Since at least 1988, plaintiffs have been on notice of proof requirements relating to establishing that a defect made a product unreasonably dangerous.

Petitioner had a full opportunity to put on her best case relating to Mr. Munsell's qualifications and methodology. Petitioner had a full hearing prior to the trial judge striking the testimony of the proffered expert. Petitioner advanced her best argument in both the trial court and Tenth Circuit in support of her proposition that Mr. Munsell was properly qualified and used appropriate methodology. Yet, the truth is that regardless of the timing of a challenge to Mr. Munsell's qualifications and methodology, or the timing of the trial court's *Daubert* analysis and findings, the witness could not properly testify in certain areas. Petitioner has had a complete appellate review of the trial court judge's rulings after a

thorough study of the record and oral argument, and a supplemental submission of legal citations. The process and procedure used throughout the trial and appeal was in complete compliance with Petitioner's Fifth and Seventh Amendment rights.

This Court has on numerous occasions concluded that the procedure set forth in Rule 50 of the Federal Rules of Civil Procedure complies with the Seventh Amendment. *Berry v. United States*, 312 U.S. 450, 61 S. Ct. 637, 85 L. Ed. 945 (1941); *Galloway v. United States*, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189, 85 L. Ed. 147 (1940); *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 (1967); *Daubert*, at 596.

The United States courts of appeals are not split on the issue of whether the trial judge can act as a gatekeeper in the absence of a motion *in limine*[1] or a pretrial hearing on the admissibility of evidence. Petitioner has failed to cite any case where the trial judge was not permitted and encouraged to make a decision on expert witness qualifications and methodology prior to submission of the case to the jury. Cases cited by the Petitioner involve issues not present in this case. Cases wherein a

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[1] This is recognized by this Court as a motion filed before or during trial to exclude anticipated prejudicial evidence before the evidence is actually offered. The trial judge is not required to decide such a motion. Any ruling on such a motion is preliminary or advisory and is subject to change as the trial unfolds. *Luce v. United States*, 469 U.S. 38, 40-42, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984); *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995).

delayed motion was urged and the trial judge refused to disallow challenged expert testimony have no relevance to this matter.

Here, unlike the factual scenario which placed the trial judge at a disadvantage in *Macsenti v. Becker*, 237 F.3d 1223 (10th Cir. 2001), *cert. denied*, 121 S. Ct. 2593, 150 L. Ed. 2d 752 (2001), the trial judge was not prejudiced by the timing of the motion. The trial judge herein properly elected to consider the motion relating to the proffered expert's qualifications and methodology, and was able to and did make specific findings as to why the testimony of the witness was excluded. The timing of the motion in the cases cited by Petitioner affected only the appellate standard to be applied when reviewing the trial judge's decision, abuse of discretion or plain error, not the authority of the trial judge to act as gatekeeper. Significantly, in this case the trial judge and the Tenth Circuit proceeded in a manner affirmed by this Court in *Weisgram v. Marley Company*, 528 U.S. 440, 455-456, 120 S. Ct. 1011, 145 L. Ed. 2d 958 (2000). Both courts concluded that Mr. Munsell was not qualified and performed insufficient work to provide reliable testimony, which would have been of assistance to the jury. Accordingly, both courts properly struck his testimony, then ruled that Petitioner's evidence was insufficient to support a verdict or judgment in Petitioner's favor.

Petitioner's Petition for Writ of Certiorari should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

A. NO CONSTITUTIONAL VIOLATION OCCURRED AS PETITIONER HAD NOTICE OF THE NECESSITY OF PRESENTING A PROPERLY QUALIFIED EXPERT WHO EMPLOYED SATISFACTORY METHODOLOGY

This is not a case of the deprivation of a constitutional right, under either the Fifth Amendment or the Seventh Amendment. Rather, this is a case where Petitioner failed to utilize a properly qualified and prepared expert witness, and failed to introduce necessary proof to establish a cause of action for jury submission under Oklahoma law. Petitioner's repeated assertion that she was without notice that a challenge to her expert's qualifications and methodology might be forthcoming is without merit or substance. Likewise, Petitioner's suggestion of improper conduct on the part of Respondent, the United States District Court for the Western District of Oklahoma, and the United States Court of Appeals for the Tenth Circuit is without merit or substance.

Petitioner commenced her lawsuit by filing her Complaint on January 6, 1999. A brief review of the status of both the Federal Rules of Evidence and interpretive decisions existing as of the dates of the filing of the Complaint and trial proceedings conclusively demonstrates Petitioner was on notice from the outset of the necessity of an appropriately qualified expert to testify in support of her case. This Court's decision in *Daubert* was rendered on June 28, 1993. Later, by its *Kumho Tire* decision rendered on March 23, 1999, this Court reinforced its *Daubert* ruling, and clarified that the trial court's *Daubert* "gatekeeping" obligation applied to all expert testimony. This

Court specifically noted that Federal Rule of Evidence 702 applied to all expert testimony. In the more recent *Weisgram* opinion, decided February 22, 2000, almost seven months prior to the August 14, 2000, trial in this case, this Court stated, at pp. 455-456:

> Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet. 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469; see also *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999) (rendered shortly after the Eighth Circuit's decision in Weisgram's case); [footnote omitted] *General Electric Co. v. Joiner*, 522 U.S. 136, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail. We therefore find unconvincing Weisgram's fears that allowing courts of appeals to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they known their expert testimony would be found inadmissible.

Finally, by way of a June 12, 2000 decision issued by the United States Court of Appeals for the Tenth Circuit, *Goebel v. Denver and Rio Grande Western Railroad Company*, 215 F.3d 1083, 1087 (10th Cir. 2000), Petitioner was on notice of the Tenth Circuit's position with respect to the timing of a district court's fulfillment of its gatekeeper role. In *Goebel*, the Tenth Circuit specifically indicated that the district court may "satisfy its gatekeeper role when asked to rule on a motion in limine, on an objection

during trial, or on a post-trial motion so long as the court has sufficient evidence to perform 'the task of insuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.' "

Petitioner also had notice that qualifications in the "human factors" field of expertise would be at issue in this case, both from development of the theory of her case prior to its filing on January 6, 1999, and from Respondent's identification and use of Richard Krenek, Ph. D., as an expert witness. (Tr. Trans. p. 131).[2]

B. THE UNDERLYING COURTS HAD THE RESPONSIBILITY AND AUTHORITY TO EXCLUDE THE TESTIMONY OF PETITIONER'S PURPORTED EXPERT

Petitioner impliedly suggests that defense decisions and the timing of defense motions can in some manner limit the authority of the trial judge, or duty of the trial judge, to perform the gatekeeper function. To accept this suggestion would, in effect, render the trial courts and the appellate courts powerless to eliminate unreliable evidence and testimony of an unqualified witness from jury deliberations. Further, it would, in effect, make counsel for the parties the ultimate gatekeepers. In essence, Petitioner asks this Court to grant certiorari to rule that the trial court and Tenth Circuit should have allowed

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[2] All references to "Tr. Trans." are to the Reporter's Transcript of Proceedings Had Monday, August 14, 2000 Before The Honorable Robin J. Cauthron, Judge Presiding.

unreliable and legally insufficient evidence to be submitted to the jury for deliberation solely because Respondent's counsel moved to strike after the testimony was complete rather than moving in advance to prohibit the testimony.

This is not a case where the trial judge was incapable of or failed to perform an evaluation of the qualifications of a proffered expert or the reliability of that expert's testimony. To the contrary, this is a case where the trial judge fully performed those duties and made detailed findings as to the deficiencies in both the qualifications and methodology of the proffered expert. The trial judge performed her role after review of the totality of the trial testimony of the proffered expert, including direct examination, cross examination, re-direct examination, and re-cross examination. Contained within the testimony of the purported expert was a thorough exploration of his qualifications and his limited case-specific work. The decision of the trial judge was made prior to the submission of the case to the jury. The trial transcript reveals that before excusing the witness, Petitioner's counsel recognized the need to and attempted to bolster Mr. Munsell's qualifications on re-direct examination. (Tr. Trans. pp. 130-132). The record further demonstrates that counsel for both Petitioner and Respondent were given a full opportunity to argue their respective positions to the trial judge prior to the rulings on the motions. Additionally, the record reveals that the trial judge independently evaluated Mr. Munsell's testimony, as is shown by her recitation of the inadequacies of his qualifications and methodology.

Petitioner urges that the trial court in some manner violated the requirements of Federal Rule of Evidence

104(a) by failing to rule on the qualifications of Mr. Munsell at some point prior to the completion of his testimony. However, the law places no requirement on the trial judge to make such a determination prior to the completion of the testimony. The trial judge is granted great flexibility and discretion as to the manner and timing of discharging his or her assigned duties. Indeed, pursuant to Rule 104(e), the trial judge was authorized to allow the jury to hear evidence of Mr. Munsell's qualifications and methodology, as that evidence could have been relevant to the weight or credibility to be given to the witness' testimony, had it ultimately been properly submitted to the jury for deliberation. *United States v. Nichols*, 169 F.3d 1255, 1263-1264 (10th Cir. 1999), *cert. denied*, 528 U.S. 934, 120 S. Ct. 336, 145 L. Ed. 2d 262 (1999). In this case, the trial judge specifically stated on the record that she was aware of no prohibition against moving to strike testimony rather than moving *in limine* ahead of trial, and that it was often easier and more efficient to make such a ruling after the testimony has been given at trial rather than to have a "full-blown hearing" prior to trial. (Appendix G to Petition for Writ of Certiorari, pp. 47a-48a; Tr. Trans. p. 147).

The Advisory Committee Notes to the 2000 Amendments to Rule 702 of the Federal Rules of Civil Procedure make it clear that the proponent of expert testimony has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence, citing *Bourjaily v. United States*, 483 U.S. 171 (1987). Petitioner did not meet the required burden. Petitioner's adverse result arose not from the timing of the motions

made by Respondent, but rather from the lack of qualifications and methodology of the witness the Petitioner chose to utilize. These deficiencies in qualifications and methodology were incurable. Petitioner did not seek to reopen her case, but such a request would have made no difference. The result would not have changed had Respondent 1) filed a motion *in limine* by the August 1, 2000 deadline for filing of pretrial motions set by the trial court, 2) included a specific challenge to Mr. Munsell in the Final Pretrial Report filed on August 11, 2000, or 3) made an oral motion immediately before or during the trial testimony of Mr. Munsell on August 14, 2000. Petitioner's witness and proof were simply insufficient to establish her case under Oklahoma substantive law.

C. A JURY COULD NOT HAVE FOUND THE SUBJECT PAVER WAS UNREASONABLY DANGEROUS

1. William P. Munsell's Testimony

Mr. Munsell, a degreed mechanical engineer, was, at the time of trial, a registered professional engineer with the Oklahoma Society of Professional Engineers. According to his testimony, he had specialized in failure analysis and evaluation of industrial accidents for nine years. However, examination of his underlying qualifications and methodology revealed even the bare necessities to allow his testimony in the areas of human factors and consumer expectation were absent. Mr. Munsell's description of his experience in the areas of failure analysis and evaluation of industrial accidents included consideration of fire fighting equipment, forklifts, off road

forklifts, smaller forklifts, tractors, cranes, cars, front-end loaders, radial arm saws, punch presses and press brakes, but not pavers. (Tr. Trans. p. 67). Although he had looked at control systems for different products in the past, he looked at the control system of *only one other paver* prior to testifying, and that was purely for purposes of this litigation. (Tr. Trans. pp. 96-97).

In preparation for his testimony in this litigation, Mr. Munsell also reviewed the United States Navy Investigation Report of the accident, some photographs of the machine at issue, brochures of exemplar machines (not pavers) and looked at excavators, bulldozers, and rollers. (Tr. Trans. pp. 70-71). The one other paver that he examined was manufactured by another company. (Tr. Trans. p. 95). In support of his opinion relating to the "counter-intuitive" nature of the Caterpillar paver speed dial, Mr. Munsell had looked at his kitchen stove and his faucet. (Tr. Trans. p. 78). He also traveled to a Sears store and looked at stoves, humidifiers, and a fan. (Tr. Trans. p. 79). The witness did not view the subject paver, did not look at the controls of pavers manufactured by other companies (except the one other manufacturer's paver examined for this litigation), and did not have knowledge of the types of controls found on other pavers used in the construction industry around the world. (Tr. Trans. pp. 96-97). Mr. Munsell had never operated a paver, had never been involved in the paving business, had never gotten on a paving machine or watched the operator of a paving machine use the controls. (Tr. Trans. pp. 99-100).

Mr. Munsell acknowledged that controls of the machine and the way an operator used controls was a part of human factors, an acknowledged specialty. (Tr.

Trans. p. 100). Mr. Munsell acknowledged that he was not a human factors engineer, acknowledged that there were people who specialized in human factors engineering, acknowledged that there was literature on controls and the way controls should operate, and acknowledged that he only looked at a human factors design text after he had reviewed Respondent's human factors expert's report, one week before trial and months after he had given his deposition. (Tr. Trans. pp. 100, 102).

Mr. Munsell testified that he had worked at Lowrance Electronics for one year, but that business made fishing equipment, sonars, and GPS satellite navigation equipment, not pavers. (Tr. Trans. pp. 109-110). He acknowledged that the people who would typically use the subject paver were people in the paving industry, people who were knowledgeable about pavers. (Tr. Trans. pp. 111-112). Mr. Munsell agreed that the "standard" about which he testified was in the nature of a suggestion, not the law, and a mere voluntary practice or guideline. (Tr. Trans. pp. 119-121). The witness also agreed that during the time he was performing his investigation to arrive at his opinions he did not consult any human factors literature. He performed no testing of any kind prior to arriving at his final opinions. (Tr. Trans. pp. 127, 129).

Mr. Munsell testified that the paver was equipped with a toggle switch which when raised up caused the paver to move forward and when lowered caused the paver to move in reverse. He acknowledged that the switch was labeled accordingly. (Tr. Trans. p. 91). He further testified that the paver had a speed control dial which when turned clockwise caused the paver to move

faster and which when turned counterclockwise caused the paver to move slower. The paver speed control dial was labeled accordingly. (Tr. Trans. pp. 92-93). Mr. Munsell conceded that the paver was thought of in the construction industry as a precision machine that needed speed control, which was as accurate as possible. Precision of the speed affected how the job was performed. (Tr. Trans. pp. 98-99). Mr. Munsell agreed that the paver was equipped with a backup alarm that sounded when the paver was placed in reverse. If the paver was in forward, no backup alarm sounded. (Tr. Trans. p. 103). He testified that there were several different procedures identified in the operator's manual to stop the paver, one of which was turning the speed dial to slow speed. An existing foot brake was another device, which could be used to stop the paver. (Tr. Trans. pp. 132-134).

2. Christi Alfred's Testimony

Petitioner's own testimony revealed the specialized area in which she was working at the time of her accident. Petitioner joined the United States Navy in March of 1996. (Tr. Trans. p. 22). After completing basic training, she was sent to an EOA school, where she was given heavy equipment operator's advanced schooling. She spent a week per machine on front end loaders, bulldozers, scrapers, forklifts, dump trucks, and diesel engines, where she learned about the mechanics and operation of the machines. That heavy equipment operator training program lasted for two to two and one-half months. (Tr. Trans. p. 23). Afterwards, she was assigned to a heavy equipment operator's yard in California and

was specifically trained on a paving machine for one to two days. Petitioner was subsequently assigned to Rota, Spain in January of 1997 and assigned to a paving crew. (Tr. Trans. p. 24). She was a screed operator, a person who stood on the back of the paver and measured the depth and width of the asphalt as it came through the machine. Petitioner had driven the subject machine, but not operated it to lay asphalt. (Tr. Trans. pp. 24-25, 42).

3. Stipulated Exhibits

Also introduced into evidence as a stipulated exhibit was a Navy investigation report, which concluded that the accident occurred because the operator made a mistake with the controls that caused the paver to move forward when he intended to stop it and reverse it. This report concluded that the operator had insufficient training to operate the paver and that there were no mechanical problems with the machine. The report concluded that the paver was equipped with a switch, which when raised up caused the paver to move forward and when lowered caused the paver to move in reverse. The switch was labeled accordingly. (Supplemental Appendix, pp. 130-131).[3]

Evidence submitted through stipulated exhibits further confirmed the specialized nature of the paving industry and paving equipment. Such evidence identified various means of operating the paver in forward and

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[3] All references to the "Supplemental Appendix" are to the document filed by Respondent in the United States Court of Appeals for the Tenth Circuit.

backward directions through a separate switch, and a means of adjusting the speed of the paver through the speed control dial. Stipulated Exhibit 3 identified the anticipated purchasers of the subject paver, all of whom were in the paving industry. They included asphalt contractors, commercial contractors, and highway contractors. (Supplemental Appendix, pp. 81-84). Page 11 of the same exhibit (Supplemental Appendix, p. 91), referenced a separate forward/reverse selector switch and a propel speed dial. Stipulated Exhibit 4, an Operations and Maintenance Manual for the subject paver, referenced a backup alarm, which would sound when the direction of the travel switch was in the reverse position. (Supplemental Appendix, p. 105). The Manual noted that the alarm was used to alert people that the paver was backing up. The Manual further referenced a brake pedal, which disengaged the ground drive and power switch, and a separate switch which, when moved to the stop position, deactivated the machine ground drive. (Supplemental Appendix, pp. 113-114). The Manual specifically identified the speed selection control dial and provided an instruction to move the control counterclockwise towards the word slow to decrease the travel or pave speed and clockwise toward the word fast to increase the travel or pave speed. (Supplemental Appendix, p. 115). A separate instruction was given to operate the directional travel control to either the forward or reverse position. (Supplemental Appendix, p. 115).

Finally, stipulated Exhibit 8 (Supplemental Appendix, p. 134), an Asphalt Paver Principles & Techniques pamphlet, specifically stated on page 9 of the pamphlet, that "[m]ost modern asphalt pavers are equipped with

'speed control' dials which make it simple for the operator to maintain a set paving speed." (Supplemental Appendix, p. 136).

D. THE PETITIONER'S EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW

Petitioner failed to introduce evidence which would have allowed the jury to determine that the subject paver, even if defective, was dangerous to the extent beyond which would be contemplated by the ordinary consumer, as that term is utilized in Oklahoma law. The requirements to establish a right to recovery under a products liability theory in Oklahoma were initially set forth by the Supreme Court of Oklahoma in *Kirkland v. General Motors Corporation*, 1974 OK 52, 521 P.2d 1353, 1363:

> First of all Plaintiff must prove that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough.
>
> Secondly, Plaintiff must prove that the defect existed in the product, if the action is against the manufacturer, at the time the product left the manufacturer's possession and control. *Thompson v. Trane Co.*, Okl. 500 P.2d 1329 (1972). If the action is against the retailer or supplier of the article, then the Plaintiff must prove that the article was defective at the time of sale for public use or consumption or at the time it left the retailer's possession and control.
>
> Thirdly, Plaintiff must prove that the defect made the article unreasonably dangerous to him or to his property as the term "unreasonably dangerous" is above defined.

The definition of "unreasonably dangerous" adopted by the *Kirkland* court was taken from comment g to the Restatement of Torts 2d § 402A:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

In *Woods v. Fruehauf Trailer Corporation*, 1988 OK 105, 765 P.2d 770, the Supreme Court of Oklahoma was required to determine the proper definition of "ordinary consumer." The Supreme Court of Oklahoma had previously recognized that it was only when a defect in the product rendered it less safe than expected by the ordinary consumer that the manufacturer would be held responsible. *Lamke v. Futorian Corporation*, 1985 OK 47, 709 P.2d 684, 686. In *Woods*, the Supreme Court of Oklahoma concluded that the proper definition of "ordinary consumer" in a products liability action is one who would be foreseeably expected to purchase the product involved. In the case at bar, the ordinary consumer would have been a person in the paving industry.

A brief review of additional portions of the *Woods* decision supports the conclusion that in this case both the trial court and Tenth Circuit were correct in their ultimate determination that the Petitioner failed to introduce sufficient evidence to justify submission to the jury. Although federal law dictates whether judgment as a matter of law is appropriate, in diversity cases the evidence is examined in terms of the underlying burden of proof as dictated by state law. *Magnum Foods, Inc. v. Continental Cas. Co.*, 36 F.3d 1491, 1503 (10th Cir. 1994). In *Woods*, through

expert testimony, the plaintiff submitted evidence to support his contention that the failure to equip the product at issue with devices which could have made it safer, or to warn of dangers of the failure to use such devices, rendered the product less safe than expected by one who would foreseeably be using the product for a foreseeable purpose. Just as in this case, that testimony was only potentially probative with respect to the existence of a defect, not to whether any such defect rendered the product unreasonably dangerous. The *Woods* product could be safely operated as equipped when placed into the flow of commerce and the safety equipment and warnings contemplated were simply an attempt to minimize an obvious danger. The Supreme Court of Oklahoma concluded that evidence that the product could have been made safer did not establish that it was less safe than would be expected by the ordinary consumer, which in that case and in this case was a specialized user, not the general public. The Supreme Court of Oklahoma concluded that plaintiff's failure to present such evidence resulted in a failure of proof of the necessary elements of the action and that a motion for directed verdict should have been sustained.

Likewise, in this case Petitioner failed in the necessary proof. As recognized by the Tenth Circuit, even if one assumed that Petitioner's evidence was sufficient to allow a jury to infer that the paver was defective, Petitioner did not establish that defect made the paver unreasonably dangerous to an extent beyond that which would be contemplated by the paving industry. In fact, the uncontroverted evidence in the case proved that the ordinary consumer was a person or entity involved in the paving industry, that the purchaser was well informed of

the proper method by which to control the movement and direction of the paver, that the use of a speed dial was common in the industry, that the paver had been previously used safely, that the accident was caused by user error and a failure to train, and that the paver was mechanically sound. Not a shred of evidence was presented to establish that the paver was unreasonably dangerous.

This evidence considered by the trial court, and considered in a *de novo* review by the Tenth Circuit, clearly and unquestionably demonstrates that both courts were correct in their determinations that the Petitioner had failed in her proof of the necessary elements of her claim under Oklahoma law. Judgment as a matter of law in favor of Respondent was the only appropriate option left for these courts.

INACCURACIES CONTAINED IN THE PETITION FOR WRIT OF CERTIORARI

In accordance with Rule 15 of the Rules of the Supreme Court of the United States, Respondent has an obligation to this Court to point out in this brief in opposition, and not later, any perceived misstatement made in the Petition. Respondent believes that numerous misstatements or misleading statements are, indeed, contained in Petitioner's filing.

1. Petitioner suggests that Respondent designed, manufactured, marketed and sold the subject asphalt paver with a defective, unreasonably dangerous "directional/speed dial control mechanism." Petitioner's description of the mechanism is inaccurate in that it

suggests that there was a single mechanism controlling both the direction and speed of the subject paver. In reality, the paver's forward/reverse direction of travel was controlled by a toggle switch, which if moved up into the position marked "forward" caused the paver to move forward and if moved down into the position marked "reverse" caused the paver to move backward. A totally separate rotary dial was used to control the speed of the paver. That dial had ascending numbers and a picture of a rabbit on the clockwise position indicating "fast" or an increase in speed. If the dial was turned counter-clockwise, descending numbers and a picture of a turtle indicated a decrease in speed. Thus, the direction of the subject paver and the speed of the subject paver were controlled independently of each other with two separate control devices.

2. Petitioner's suggestion that Respondent moved for judgment pursuant to Rule 50 of the Federal Rules of Civil Procedure after Petitioner's case was presented to the jury may be misleading. Following the close of the evidence presented by Petitioner, Respondent made its motions. The case had not, at that point, been submitted to the jury for its consideration. Petitioner made no request that she be allowed to reopen her case and present additional evidence. Respondent's motion was made prior to Respondent putting on witnesses or evidence beyond the testimony and evidence received in Petitioner's portion of the case.

3. Petitioner's assertion that the paver contained an "unconventional directional/speed dial control" is inaccurate. As stated, the speed control dial did not control the direction of travel of the subject paver. Moreover,

as has already been demonstrated, most modern asphalt pavers were equipped with speed control dials. Petitioner's suggestion that the "unconventional directional/ speed control dial mechanism" caused the paver to pin Petitioner against a tree and caused severe injuries to her, is inaccurate. The evidence in the case demonstrated that the cause of Petitioner's position and injuries was that the operator of the subject paver had the directional switch in forward instead of reverse and turned the speed dial to increase speed in the forward direction.

4. Petitioner's suggestion that the Court of Appeals for the Tenth Circuit found Mr. Munsell to be an expert in Mechanical Engineering is also inaccurate. The Court of Appeals made no specific finding concerning Mr. Munsell's expertise, but did conclude that part of his testimony was admissible expert testimony. Specifically, the portion of his testimony wherein he opined that the speed control dial failed to comply with SAE J297, a voluntary standard, was found to be the only admissible expert testimony provided by Mr. Munsell.

5. Petitioner's suggestion that evidence of SAE standard J297 was admitted without objection is contrary to the record. Counsel for Respondent very clearly objected to admission of the standard on the basis of relevancy, stating that it did not apply to the paver which is the subject of this case. (Tr. Trans. p. 81).

6. Petitioner's suggestion that the Court of Appeals has rendered a "mixed decision" that in and of itself calls for review is incorrect. The Tenth Circuit's decision was consistent with manufacturer's products liability law in the state of Oklahoma. The Tenth Circuit's finding that

Mr. Munsell could give expert testimony as to whether the rotary speed control dial complied with SAE J297 related, at best, to only one of the necessary elements the plaintiff must prove to prevail on a manufacturer's products liability claim; i.e., defect. Mr. Munsell was unqualified in the field of human factors and his research and preparation for trial were cursory and inadequate. This combination rendered his testimony unreliable and inadmissible. The trial court and the Tenth Circuit correctly concluded that such testimony could not help the jury. The Tenth Circuit specifically noted that, while a jury could infer that the product was defective based upon the failure to comply with SAE J297, there was insufficient evidence to show that any such defect made the product unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer. Petitioner failed to introduce evidence relating to that element of the claim and, therefore, the Tenth Circuit correctly concluded that judgment as a matter of law in favor of the Respondent was mandated.

7. Petitioner's repeated references to purported confusion on the part of Respondent's counsel in questioning Mr. Munsell are inaccurate, and simply reinforce the inescapable conclusion that Petitioner did not understand the necessity of introducing evidence relating to the expectation of the ordinary consumer, one in the paving industry. Review of the trial transcript reveals that Petitioner has mischaracterized and exaggerated the exchange upon which she relies. Respondent's counsel clearly understood how the speed control dial functioned but made a simple misstatement, accidentally saying "clockwise" when he meant "counter-clockwise". (Tr.

Trans. p. 92). In the wording of the question at issue, counsel specifically described a turn of the dial to the left toward the turtle picture and the word "slow", which was a counter-clockwise turn.[4]

In any event, Respondent's counsel was a lay person, not one who would be reasonably expected to purchase or use a paver. The expectation of a lay person was not relevant to a jury determination in this case. Thus, Petitioner's position that "Munsell is a mechanical engineering expert who opined that Respondent's paver's directional/speed *dial* control mechanism was 'counter-intuitive,' especially to lay persons" serves no purpose in the presentation to this Court, other than to once again confirm the inadequacy of the proof offered by Petitioner.

8. Petitioner's suggestion that Respondent somehow misled Petitioner to believe that Mr. Munsell was qualified is without merit. Respondent's counsel at no time was requested to or entered into a stipulation of sufficiency of qualifications or methodology. Respondent at all times denied Petitioner's allegations that the paver was defective and unreasonably dangerous. Moreover, Respondent's counsel never suggested that such a challenge would not be made. The critical question was not whether Respondent felt Mr. Munsell was qualified, but whether he, in fact, was qualified. It was incumbent on the Petitioner to have a qualified witness who utilized

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[4] "Q. If you turn it clockwise, or to the left, you have a turtle down here that says 'slow,' and then you turn it clockwise and the numbers get bigger and it comes around here to the rabbit." (Tr. Trans, p. 92, lines 16-19).

appropriate methodology. Respondent was not empowered to make an unqualified witness qualified or make insufficient methodology sufficient. The filing of a pretrial motion would not have affected either Mr. Munsell's qualifications or methodology. The trial judge was required to act as the gatekeeper, not the Respondent. Petitioner was unable to rehabilitate Mr. Munsell based upon a lack of qualifications and methodology, not due to any action or inaction of the Respondent or Respondent's counsel. This is true whether Respondent filed a motion *in limine* on August 1, 2000, included a specific challenge in the Final Pretrial Report filed on August 11, 2000, objected during Mr. Munsell's August 14, 2000 testimony, or moved to strike the testimony after its completion.

Petitioner, in effect, seeks to change the burden of proof. Instead of Petitioner being required to utilize a properly qualified witness who used appropriate methodology, petitioner wishes to shift the burden to the Respondent to demonstrate a non-qualified witness and insufficient methodology. Under Petitioner's suggested procedure, even a motion *in limine* filed by the deadline set by the trial court for the filing of pretrial motions, or a motion made during Mr. Munsell's testimony, would have been insufficient. Petitioner seeks both to improperly shift the burden of proof and improperly deprive the trial court and appellate court of their authority to preclude ultimate submission of inappropriate evidence to a jury.

CONCLUSION

Petitioner was not denied a trial by jury by any action of the Respondent, the trial court, or the Tenth Circuit. Rather, Petitioner was denied jury consideration because Petitioner tendered insufficient and unreliable evidence. This case presents no issue or question of the character justifying Petitioner's request that this Court grant her Petition for Writ of Certiorari. Petitioner has failed to demonstrate a compelling reason for involvement in or review by this Court. Respondent prays that the Petition be denied.

Respectfully submitted,

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